Supreme Court, U.S.
FILED
APR 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1313

In the Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
PETITIONER

v.

RONALD L. COSBY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that under the circumstances of this case certain employees of a railroad's motor carrier subsidiary were entitled to labor protection benefits when they were laid off following a railroad merger.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Applications for Motor Carrier Operating Authority by Railroads & Rail Affiliates, 132 M.C.C. 978, aff'd *sub nom. American Trucking Ass'ns, Inc.* v. *ICC*, 722 F.2d 1243, cert. denied, No. 83-2117 (Oct. 29, 1984) 8

Chicago, M., St. P. & Pac. R.R., In re, No. 77 B 8999, (Order No. 809) (N.D. Ill. Feb. 19, 1985) 7

Chicago, M., St. P. & Pac. R.R. Reorganization - Acquisition by Grand Trunk Corp., Finance Docket No. 28640 (Sub.-No. 9) (ICC Feb. 19, 1985) 7

Midwest Buslines, Inc. — Purchase (Portion) - American Buslines, Inc., 97 M.C.C. 426 6

New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60, aff'd, 609 F.2d 83 ..... 2, 3, 4, 5

Page

Cases—Continued:

Overnite Transportation Co. - Purchase - Rutherford Freight Lines, Inc., 97 M.C.C. 568, aff'd *sub nom. American Buslines, Inc.* v. *United States*, 253 F. Supp. 481, aff'd, 385 U.S. 38 6

Penn Central Transportation Co. Reorganization, 347 I.C.C. 45 6

Statutes:

Interstate Commerce Act:

49 U.S.C. 11344(c) 2, 3, 4, 7

49 U.S.C. 11347 ..... 2, 3

Milwaukee Railroad Restructing Act, 45 U.S.C. 901 *et seq.* 7

Pub. L. No. 94-210, § 402(a), 90 Stat. 62 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 741 F.2d 1077. The decision of the Interstate Commerce Commission (Pet. App. 15a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on August 22, 1984. A petition for rehearing was denied on October 18, 1984 (Pet. App. 23a). On December 20, 1984, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including February 15, 1985, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the court of appeals' decision that employees of a railroad's motor carrier subsidiary are entitled to the employee protection guarantees of railroad employees.

1. This case involves approximately 110 employees of Frisco Transportation Company (FTC), a motor carrier subsidiary of the St. Louis-San Francisco Railway Company (Frisco). In 1980, the Interstate Commerce Commission gave its approval to the merger of Frisco into the Burlington Northern Railroad Company (BN). Under Section 11347 of the Interstate Commerce Act (49 U.S.C.),[1] the Commission is required to provide a substantial level of protection, known as the "*New York Dock* conditions,"[2] to affected railroad employees when a rail carrier is involved in a transaction requiring Commission approval. The Commission has on occasion provided some limited protection for motor carrier employees affected by a motor carrier merger or consolidation, pursuant to its general authority to impose conditions in connection with a merger or consolidation (49 U.S.C. 11344(c)).[3] In the case of Frisco's merger into BN, the Commission imposed the "*New York Dock*

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[1]See Pet. App. 28a.

[2]The protective conditions were described in *New York Dock Ry. -Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), aff'd, 609 F.2d 83 (1979). These conditions were fashioned by the Commission to implement a 1976 congressional directive that railroad employee protective conditions be "no less protective of the interests of employees than those heretofore imposed." Pub. L. No. 94-210, § 402(a) 90 Stat. 62. The protections are substantial — displaced employees receive full pay and fringe benefits for six years (see Pet. App. 29a, 32a-35a).

[3]See Pet. App. 27a-28a.

conditions" for "railroad employees of the merged system and subsidiaries" in connection with the merger.[4]

Prior to the merger, BN had represented that there would be no change in FTC's operations. Following the merger, however, FTC experienced substantial losses and BN decided to close down FTC and lay off its employees. BN maintained that FTC employees were not covered by the employee protective conditions imposed in the merger because they were motor carrier employees rather than "railroad employees." In January 1983, FTC employees petitioned the Commission to require BN to comply with the protective conditions.

2. The Commission denied the FTC employees' request to enforce the protective conditions. It held that the protection imposed was intended to be limited to those employees traditionally protected by Section 11347 — employees of railroads, and not employees of non-rail subsidiaries (Pet. App. 17a). The protective condition itself was specifically limited to "railroad employees," the Commission noted (*ibid.*). It stated that it had not intended to exercise its discretionary power under Section 11344(c) in order to extend *New York Dock* protection to motor carrier employees affected by the merger (Pet. App. 17a-18a).

The Commission went on to consider whether it should issue a supplemental order, a power exercised in extraordinary cases where a party has failed to comply with representations made during merger proceedings. After reviewing the record, the Commission found no misrepresentation by BN of its intentions regarding FTC, and adopted BN's argument that the FTC layoffs resulted from unforeseen

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[4] "*Burlington Northern, Inc. - Control & Merger - Saint Louis, S.F. Ry.*, 360 I.C.C. 788, 1182 (1980). These railroad employees were "entitled to the standard level of protection" (360 I.C.C. at 1182), *i.e.*, the level specified in *New York Dock*.

changes in business circumstances occurring after the merger. Accordingly, the Commission held that there was no warrant for imposing new obligations on BN.

3. The court of appeals reversed, holding that FTC's employees were entitled to the *New York Dock* protections. It gave alternative grounds for its decision.

The court first concluded that the FTC employees were entitled to the protection of the *New York Dock* conditions because they were "railroad employees" within the meaning of the Interstate Commerce Act (Pet. App. 2a-7a). The court distinguished the cases relied upon by the Commission on the ground that the motor carriage performed by FTC was limited to transportation which was auxiliary to rail movements and thus, in the court's eyes, "intimately tied to the railroad's main transportation system" (Pet. App. 6a-7a). This "auxiliary-to-rail" limitation on FTC's activities convinced the court that FTC differed from other non-rail subsidiaries of railroads and from other motor carriers, transforming FTC's employees into "railroad employees." The court also concluded that the FTC employees were "affected" by the merger since, if "FTC has not been made a subsidiary of BN as a result of the merger, BN could not have phased out FTC" (Pet. App. 3a-4a).

The court then "alternatively" (Pet. App. 14a) adopted the Commission's position that protection of these motor carrier employees was discretionary, but reached the same conclusion as to the appropriate protection in this case. The court held that, "under the facts and circumstances of this case, it was an abuse of discretion not to grant the FTC employees the same protective conditions granted to Frisco's other railroad employees" (Pet. App. 7a-8a). The court based this conclusion on a document filed by BN (Pet. App. 11a-12a) and testimony by an officer of BN's motor carrier subsidiary (Pet. App. 13a) representing that there would be

no change in the operation of FTC following the merger. It also pointed to several statements by BN and Frisco management officials, which did not refer specifically to FTC employees, to the effect that employees would be protected from the effects of the merger (Pet. App. 8a-11a). Concluding that the FTC employees "had the right to rely" on these representations (Pet. App. 14a), the court ruled that the Commission abused its discretion in failing to provide *New York Dock* protection for FTC's employees.

Following the court of appeals' decision, the Commission reopened proceedings and, in accord with the Eighth Circuit's mandate, imposed "employee protective conditions at the level authorized in *New York Dock* * * * for the benefit of the former employees" of FTC (Pet. App. 24a).[5]

ARGUMENT

The federal respondents disagree with the court of appeals' conclusions. Nevertheless, we do not support the petition for certiorari because, in our view, further review of this proceeding is not warranted. The effect of the court's ruling is limited to 110 displaced employees since the issues presented in this case are unlikely to recur. The Commission can fulfill its responsibilities without hindrance under the court of appeals' second alternative ruling. Accordingly, despite the court's erroneous conclusions, this case does not merit plenary consideration by the Court.

1. The court of appeals' determination that the employees of a railroad's motor carrier subsidiary are "railroad employees" entitled to mandatory employee protection contravenes 40 years of Commission precedent. During

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[5]The Commission declined to determine individual benefits, referring that issue to the parties, or, if negotiations fail, to arbitration, as required by the *New York Dock* conditions (Pet. App. 24a).

should be classified as railroad employees or motor carrier employees. In December 1982, the Commission adopted a policy statement informing the public that it would no longer routinely impose the auxiliary-to-rail restriction on motor carrier subsidiaries of railroads. *Applications for Motor Carrier Operating Authority by Railroads & Rail Affiliates*, 132 M.C.C. 978, 989 (1982), aff'd *sub nom. American Trucking Ass'ns Inc.* v. *ICC*, 722 F.2d 1243 (5th Cir.), cert. denied, No. 83-2117 (Oct. 29, 1984). Consequently, motor carrier subsidiaries of railroads have been acquiring unrestricted operating authority. Since employees of a motor carrier with unrestricted operating authority would not be "railroad employees" under the court's first alternative ground, the significance of that decision is diminished by the Commission's recent policy statement.

In short, the court of appeals' ruling, while wrongly decided on the merits, is not likely to have a significant adverse effect on the Commission's administration of the Interstate Commerce Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1985

DOJ-1985-04